91-1276

Supreme Court, U.S.
FILED
FEB 6 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IRVIN B. GORDON and PEGGY T. GORDON,
Petitioners,

v.

BOARD OF ZONING APPEALS, CARROLL COUNTY, MARYLAND; JOHN TORTURA; ALBERT W. SELBY; and JOHN B. FITZ,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, and APPENDIX

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QUESTION PRESENTED FOR REVIEW

Where a local administrative agency interposes its formal, written opinion as its sole defense to a charge that it has attempted to confiscate property by extortionate use of its zoning-powers, should a federal court accept the agency's recitation of "facts" in that opinion as conclusive, or determine upon the court's own independent judgement what actually are the facts relevant to the issue of confiscation?

Specifically, respondent Board of Zoning Appeals denied petitioners Irvin and Peggy Gordon a conditional-use permit for their land because, although the Gordons offered to improve a private access road to standards adequate for the anticipated traffic, they refused to improve the road to more-demanding county standards at a much higher cost. The Gordons' complaint alleged that

- uncontroverted evidence showed the improvement they proposed to be adequate for the intended use;

- improvement to county standards would enable the private road to function as a connector between existing county roads, thereby forcing the Gordons to dedicate their real property to public use without compensation and at a large monetary cost;

- the controlling factor in the Board's denial of the permit was the Gordons' refusal unnecessarily to improve the road to county standards; and

- the Board withheld the permit to extort from the Gordons, without compensation, the unnecessary improvement of the road and its dedication to public use, in violation of 42 U.S.C. § 1983.

Under these circumstances, did the District Court properly grant summary judgment to the Board, even though the Board: (i) conceded that "there is no dispute as to any material facts with which the claims presented in the Complaint are concerned"; and (ii) offered no evidence other than the very opinion the Gordons attacked as merely a pretext for the Board's attempt to confiscate their property? Or was the District Court required to determine as a matter of both law *and fact*, and independent of the self-serving conclusory statements in the Board's opinion, whether the Board's action was such an attempt?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit, the judgment of which is here for review, include:

1. petitioners Irvin B. Gordon and Peggy T. Gordon, plaintiffs-appellants in the Court of Appeals; and

2. respondents Board of Zoning Appeals, Carroll County, Maryland; John Tortura; Albert W. Selby; and John B. Fitz, defendants-appellees in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTRODUCTION

Pursuant to Part III of the Rules of this Court, petitioners Irvin B. Gordon and Peggy T. Gordon (the "Gordons") hereby petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion the Court of Appeals issued in support of its judgement is unreported, and appears in the Appendix hereto ("Pet. App.") at 1a. The opinion of

the District Court is unreported, and appears in Pet. App. at 6a. The Magistrate's Report and Recommendation is unreported, and appears in Pet. App. at 10a. The opinion of respondent Board of Zoning Appeals (the "Board") is unreported, and appears in Pet. App. at 23a.

JURISDICTION

The Court of Appeals entered its judgment on 10 October 1991. On 2 January 1992, Mr. Chief Justice Rehnquist extended the time for filing this petition until and including 7 February 1992.[1]

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves application of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983, the texts of which appear in Pet. App. at 43a.

STATEMENT OF THE CASE

The Gordons seek review of the judgment of the Court of Appeals, affirming the District Court's grant of summary judgment for the Board. The Gordons contend that the lower courts failed to perform their constitutional duty to exercise independent judgment as to both the law and the facts on the issue of whether the Board's refusal to grant the Gordons a conditional-use permit for their land was an attempt to confiscate the Gordons' property by extortion.

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[1] Pet. App. at 42a.

On 7 August 1984, the Gordons filed a conditional-use zoning request with the Board for the establishment of a private club on a parcel located on Strawbridge Terrace, north of Johnsville Road in Eldersburg, Carroll County, Maryland.[2] The Gordons intended to include in this development adjoining land they had contracted to purchase. The Gordons proposed to provide two routes of vehicular access to the club: (i) Placid Drive and Strawbridge Terrace, public streets constructed to county standards; and (ii) a private road on the adjoining property, not constructed to county standards.

At the Board's hearings of 27 September and 10 October 1984, the Gordons testified that they intended to lay a two-lane, tar-and-chip surface on the private road. They estimated the cost of this improvement at $25,000, $55,000 less than the cost of reconstructing that road to county standards. Unchallenged expert-testimony confirmed that the improvement the Gordons proposed would be adequate for the traffic anticipated at the club, even if all the traffic used the private road. The Gordons did not offer to improve the private road to county standards for two reasons: (i) They wished to avoid excessive cost, in light of the proposed use. And (ii) improvement of the road to county standards would enable it to function as a connector between the county roads Strawbridge Terrace and Johnsville Road, in effect forcing the Gordons to reconstruct the private road

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[2] The historical facts of this case are drawn primarily from the Gordons' complaint. Pet. App. at 31a. The Board has admitted that "there is no dispute as to any material facts with which the claims presented in the Complaint are concerned". *Id.* at 40a.

for and dedicate it to county use, not only without compensation, but at immense personal cost.

In its opinion of 17 January 1985, the Board denied the Gordons' request for a conditional-use permit. Decisive to the Board's decision was the Gordons' refusal to improve the private road to county standards:[3]

- * * * unless [the private road] is completed to county standards, it is evident that the most appropriate use of the [subject property] would be of residential character [and not for a private club].

- Even with the dismissal of all other factors presented in opposition to the request, it is evident that with vehicular access by only one road, built to county standards, * * * the proposed use would have *greater adverse effects* at this particular location than the use might have elsewhere.

- The conditional use request as presented by the [Gordons] is not in keeping with the purpose of the zoning ordinance as it is their specific intent not to complete the construction of [the private road] to county standards * * *.

The Gordons contend that these statements were merely pretextual, and that the Board's true motivation in denying their conditional-use permit was to extort from them both: (i) $55,000 to improve the private road to county standards; and (ii) the perpetual, uncompensated use of the improved road for county purposes thereafter.

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[3] Pet. App. at 28a, 29a.

After the Circuit Court for Carroll County, Maryland, dismissed the Gordons' appeal of the Board's decision for procedural reasons, on 15 January 1988 they filed their federal civil-rights complaint[4] in the District Court, alleging violations of the Fourteenth Amendment.[5] In its "motion to dismiss or in the alternative for summary judgment", the Board conceded that "there is no dispute as to any material facts with which the claims presented in the Complaint are concerned";[6] and it submitted no affidavits, documents, or other purported evidence. Before the Gordons could conduct discovery, the District Court referred the matter to a Magistrate.[7]

The Magistrate received the parties' legal memoranda, together with "a certified copy of the court file for the Gordon's prior action * * * in the Circuit Court for Carroll County",[8] but requested no evidentiary submissions from the Gordons or the Board, held no evidentiary hearing, and allowed no oral argument. On 10 July 1989, the Magistrate recommended that the Board be granted summary judgment. "The Gordons argue", the Magistrate wrote,

> that requiring construction of the [private] road to county standards, at an increased cost and resulting in their forced contribution of such a road to the public use, constitutes "extortion"

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[4] Under 42 U.S.C. §§ 1983 *et seq.*

[5] Pet. App. at 31a.

[6] *Id.* at 40a.

[7] Order of 22 December 1988, Docket No. 12, *Gordon* v. *Board of Zoning Appeals*, Civil No. HM 88-119 (D. Md.)

[8] Pet. App. at 10a. The record of the Carroll County case contained no evidence relevant to this petition.

and violates the Fourteenth Amendment. This can best be characterized as a claim that the condition imposed by the Board on the granting of a special-use exception violates the takings clause of the Fifth Amendment, as incorporated against the states in the Fourteenth Amendment. *See*, *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987). In *Nollan*, the California Coastal Commission conditioned a building permit for beachfront property on the owners' granting of an easement allowing the public to walk across the beach in front of the owners' house. The Supreme Court recognized that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Id.* at 836. Accordingly, "the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Id.* In *Nollan*, however, the Court found that allowing the public to walk across the beach did not serve the Commission's announced purpose of protecting the view of the beach for passersby on the other side of the shorefront property. The Court stated: "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.* at 837. * * *

> In this case, an examination of the Board's decision shows that the condition imposed was reasonably related to the legitimate police-power purpose which caused the Board to deny the special-use exception. After hearing testimony at two days of hearings, the Board concluded that the increased traffic would have an adverse effect on the residential character of the neighborhood, particularly if only one of the possible access roads met county standards. The requirement of a "nexus" between the condition and the original purpose of the zoning restriction to which the Gordons sought an exception is satisfied. No unconstitutional taking occurred.
>
> To the extent that the Gordons' complaint may be construed as a [substantive] due process claim, it lacks merit on this ground also. * * * [S]ubstantive due process requires that the government's action not be clearly arbitrary or without a substantial relation to the public welfare. * * * These requirements have been satisfied.[9]

The Gordons objected to the Magistrate's report,[10] because it gave conclusive evidentiary weight to the Board's self-serving decision, precluding them even from attempting to disprove the decision's factual basis, and flew in the face of the Board's own concession that that "there is no dispute as to any material facts with which the claims presented in the Complaint are

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[9] *Id.* at 20a-22a (footnotes omitted).

[10] Plaintiffs' Objections to the Magistrate's Report and Recommendation, Docket No. 14, *Gordon* v. *Board of Zoning Appeals*, Civil No. HM 88-119 (D. Md., filed 27 July 1989).

concerned".[11] Notwithstanding these objections, the District Court affirmed the report, saying that,

> [c]ontrary to [the Gordons'] assertions, the Board's action was proper as a matter of constitutional law, not merely because the Board said its action was proper. To be valid, a zoning restriction must be within the perimeter of the police power. * * * The Board decided that it would not grant the special-use permit unless plaintiffs agreed to improve one of the access roads. This condition was imposed because the Board determined that increased traffic going to and from the club would have an adverse impact on the residential character of the neighborhood. * * *
>
> * * * In the case at bar, the permit condition does not violate the takings clause because the condition imposed is reasonably related to the purpose of the restriction. Improving an access road to meet county standards is reasonably related to reducing traffic on the existing roads in the area and preserving the residential character of the neighborhood. Thus, * * * the actions of the Board in this case did not constitute a violation of the takings clause.
>
> Upon review of the record, this Court concludes that there is no genuine issue as to any material fact in this case.[12]

In reciting why "[t]his condition was imposed" and what "[*t*]*he Board* determined", however, the District Court did not acknowledge that:

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[11] Pet. App. at 40a.

[12] *Id.* at 8a-9a.

- neither it nor the Magistrate had made any independent findings of fact, choosing instead to rely exclusively on the Board's decision;
- the Gordons had alleged the "condition was imposed" for the purpose of extortion and the Board's "determin[ation]" was a mere pretext, without evidentiary basis; and
- the Board itself had conceded that "there is no dispute as to any material facts with which the claims presented in the Complaint are concerned".[13]

On the Gordons' appeal, the Court of Appeals affirmed. The court also recited at length what "[*t*]*he Board* found" and what "[*t*]*he Board* concluded"—once again, based on *the Board's* decision alone.[14] For, as did the Magistrate and the District Court, the Court of Appeals itself made no independent findings of fact. The Court of Appeals then inaccurately described how "[v]ehicular access would be through two streets in the * * * subdivision and what was described as a privately owned unimproved road which had been opened and used for many years" [15]—omitting how the Gordons' expert had testified without contradiction that, once improved, the private road could accommodate *all* the traffic to the club. The court also curiously noted that "[t]he Gordons contemplated improving the portion of the unimproved road with tar and chips, which was inconsistent with the then existing construction of Strawbridge Terrace

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[13] *Id.* at 34a, 40a

[14] *Id.* at 3a, 4a (emphasis supplied).

[15] *Id.* at 3a.

and the county standards for construction of county roads" [16]—an "inconsisten[cy]" that begged the question of whether "county standards" were relevant to a *private* road the Gordons never intended would function as a connector to Strawbridge Terrace.

"The district court found", the Circuit Court then ruled,

> that the condition imposed by the Board was reasonably related to the legitimate police-powers of the county and fell within the purpose of the zoning restrictions, and that the conditional-use requirement of improving the access road to meet county standards was reasonably related to reducing traffic on the existing roads in the area and the preservation of the residential character of the neighborhood. *Such a holding is supported by the facts of the case.*
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> * * * * * *
>
> The trial court found that conditions here imposed were reasonable, were reasonably related to the zoning, were within the police power *and nothing in the record suggests that the* [*Board*] *acted in bad faith or abused its discretion.*[17]

The court did not explain, however, that:

- the only "facts of the case" "support[ing]" this conclusion were the Board's own self-serving statements in its decision;
- the Gordons' complaint attacked these "facts" as pretextual fabrications; and

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[16] *Id.* at 3a.

[17] *Id.* at 4a, 5a (emphasis supplied).

- the Board's motion for summary judgment itself explicitly conceded *arguendo* that "there is no dispute as to any material facts with which the claims presented in the Complaint are concerned".[18]

This petition followed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This case presents a novel and fundamental issue of property rights at the intersection of this Court's decisions in *Nollan*[19] and *Ben Avon Borough*[20]—to wit,

> Where a local administrative agency interposes its formal, written opinion as its defense to a charge that it has attempted to confiscate property by extortionate use of its zoning-powers, should a federal court accept as *conclusive* the agency's recitation of "facts" in that opinion, or determine upon the court's own *independent* judgement what actually are the facts relevant to the issue of confiscation?

The District Court and the Court of Appeals treated the Board's opinion as a *conclusive* factual record, notwithstanding either the Gordons' claim that the opinion was merely self-servingly pretextual and belied by the facts, or the Board's own concession that "there is no dispute as to any material facts with which the claims presented in the Complaint are concerned" [21]. Thus, the lower courts have erro-

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[18] *Id.* at 40a.

[19] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[20] *Ohio Valley Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

[21] Pet. App. at 40a.

neously decided an important question of federal constitutional law which, if it has not already been settled implicitly by *Nollan* and *Ben Avon Borough*, ought to be settled explicitly now.[22]

I. *Ben Avon Borough* precluded the lower courts from granting summary judgment to the Board without independent judicial scrutiny of the facts.

> Federal Rule of Civil Procedure 56(c) provides that a summary judgment sought [by the moving party] shall be rendered forthwith if the pleadings * * * show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Three facts are especially material to the legal issues the Gordons raised: namely,

- "the improvement [the Gordons] proposed [to the private road] would be adequate for the vehicular traffic anticipated at the club, even if all the traffic used the private road";
- the Board denied the conditional-use permit because the Gordons refused to improve the private road to county standards; and
- in denying the permit, the Board intended to extort from the Gordons the improvement and dedication of the road to county use without compensation.[23]

The Gordons describe these allegations from their complaint as "facts" because, not only did the Board not attempt to refute them through the use of "dep-

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[22] *See* Rule 10.1(c) of the Rules of this Court.

[23] Pet. App. at 33a-34a.

ositions, answers to interrogatories, and admissions on file",[24] but also *the Board explicitly admitted that "there is no dispute as to any material facts with which the claims presented in the Complaint are concerned"*.[25] To be sure, this admission was for the purpose of the Board's motion for summary judgment only. But, in the context of that motion, the admission against interest was as effective as any evidence the Gordons might themselves have adduced. For this reason, the Board was entitled to summary judgment only if there were *no possible legal theory* under which these facts would state a cognizable federal claim.

The Magistrate, however, correctly identified two bases for recovery: (i) a "takings" theory—*i.e.*, that, in improperly requiring, as a condition to the grant of a conditional-use permit, that the Gordons improve the private road to county standards, the Board attempted to "take" property from them without compensation; and (ii) a "substantive-due-process" theory—*i.e.*, that, in imposing that condition for an extortionate purpose, the Board acted arbitrarily and without a substantial relation to the public welfare.[26] The Gordons analyze the purely legal aspects of these theories *post*. Here, they emphasize that the theories' application assumes a *factual* predicate: namely, *what* the Board did and *why*.

If, as a matter of fact, the Board denied the conditional-use permit for a reason within, *and on the basis of evidence supportive of*, its zoning powers, then (by hypothesis) the Board did not improperly attempt

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[24] 23 Fed. R. Civ. P. 56(c).

[25] Pet. App. at 40a (emphasis supplied).

[26] *Id.* at 20a-22a.

to "take" any property belonging to the Gordons. Yet the question remains: *Was the Board's decision actually supported by the evidence?* The Magistrate reported that

> an examination of *the Board's decision* shows that the condition imposed was reasonably related to the legitimate police-power purpose which cause the Board to deny the special-use exception. After hearing testimony at two days of hearings, *the Board* concluded that the increased traffic would have an adverse effect on the residential character of the neighborhood, particularly if only one of the possible access roads met county standards.[27]

The District Court also stated that

> [t]he condition was imposed because *the Board* determined that increased traffic going to and from the club would have an adverse impact on the residential character of the neighborhood.[28]

And the Court of Appeals, too, satisfied itself by reciting what "[*t*]*he Board* found" and what "[*t*]*he Board* concluded", treating these self-serving findings and conclusions as "the facts of the case" and "the record".[29] But whether these descriptions are factually correct *vel non* depends on more than what *the Board itself* "found", or "concluded", or "determined"—unless the Board's self-serving statements are conclusive and irrebuttable *per sese*.

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[27] *Id.* at 21a (emphasis supplied).

[28] *Id.* at 14a (emphasis supplied).

[29] *Id.* at 3a-5a (emphasis supplied).

The Gordons contended that the Board's "findings" were simply verbal pretexts covering up an unconstitutional purpose in denying the conditional-use permit, and that "[u]nchallenged expert testimony introduced at the [Board's] hearings" so proved.[30] *And the Board candidly, if brazenly, admitted as much.*[31] Therefore, for the purposes of the Board's motion for summary judgment, the lower courts were bound to presume the Gordons correct, and the Board's "findings" not only wrong but also *knowingly and intentionally false.*[32]

Similarly, *if*, as a matter of fact, the Board denied the special-use exception for a reason within, *and on the basis of evidence supportive of*, its zoning powers, then (by hypothesis) the Board did not act arbitrarily or without a substantial relation to the public welfare. Yet, once again, the question remains: **Was the Board's decision supported by the evidence?** The Magistrate simply relied on her earlier ruling (quoted above) to find that, on the basis of *"the Board's decision"*, "[t]he requirements have been satisfied".[33] The District Court adverted not at all to the matter. And the Court of Appeals opined that "nothing in the record"—that is, the Board's opinion—"suggests that the [Board] acted in bad faith or abused its discretion".[34] But, once again, whether this description is factually correct depends on more than what *the Board itself* said—unless its mere exculpatory state-

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[30] *Id.* at 33a.

[31] *Id.* at 40a.

[32] *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

[33] Pet. App. at 22a.

[34] *Id.* at 5a.

ments confer absolute immunity from inquiry by the federal courts into its unconstitutional motives for action against the Gordons.

The Gordons denounced the Board's denial of the conditional-use permit as both arbitrary and without a substantial (or any) relation to the public welfare, because the Board maliciously intended to extort property from them.[35] And, for the purposes of its motion, *the Board admitted as much.*[36] Therefore, for those purposes, the lower courts were bound to presume the Gordons correct, and the Board's "findings" not only wrong and knowingly and willfully false, but also intentionally jury-rigged for an *illegal* end.[37]

Thus, incorrect was the District Court to hold that "[c]ontrary to [the Gordons'] assertions, the Board's action was proper as a matter of constitutional law, not merely because the Board said its action was proper", and the Court of Appeals to rule that "[s]uch a holding is supported by the facts of the case".[38] For the lower courts exonerated the Board *only* because, *according to the Board's own unilateral and self-serving "findings"*, "there is no genuine issue as to any material facts in this case".[39] That is, in the lowers courts' schizophrenic view, the Board's action was legally proper *because and only because those courts accepted as factually true everything the Board said in its decision*—even though the Gordons placed

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[35] *Id.* at 34a.

[36] *Id.* at 40a.

[37] *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

[38] Pet. App. at 8a, 4a.

[39] *Id.* at 9a.

the honesty of that decision squarely in issue, and the Board conceded *arguendo* the correctness of the Gordons' complaint![40]

Here, indeed, is a simple test for granting summary judgment when local governmental agencies deny benefits to citizens: "In the decision denying those benefits, did the agency recite *pro forma* 'facts' that exonerate it of federal civil-rights liability?" If such a recitation appears, then the agency is entitled to judgment, *even if its recitation be knowingly and willfully false*! Inasmuch as essentially every agency decision generates some script of "facts" supposedly subtending the agency's action, under the lower courts' approach *no federal civil-rights case is possible where the complainant attacks the agency's intentional falsification of those "facts" in a formal ruling.* Rather, according to the lower courts, *all "fact-finding" by a local governmental agency is absolutely immune from independent scrutiny by the federal judiciary, even where that "fact-finding" is the very means by which the agency knowingly, willfully, and maliciously denies the complainants' federal constitutional rights*!

This, of course, is not the law, as even the Court of Appeals has recognized elsewhere.[41] More impor-

[40] The Gordons' characterize the lower courts' actions as "schizophrenic" because, on the one hand, those courts mechanically accepted as "facts" whatever the Board said in its opinion; but, on the other hand, totally ignored the Board's concession that that opinion was a mere sham.

[41] *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 175 (4th Cir. 1988) ("[r]ecent cases decided by the Supreme Court raise questions about the propriety of summary judgment of takings claims without a fully developed factual record").

tantly, it could never be the law, as a matter of basic constitutional principle. Whether the improvement of the private road to county standards was necessary is an issue of "constitutional fact", because the fact (whatever it is) determines the constitutional result. If the evidence supports the Board, then its denial of the conditional-use permit was constitutional. *But if the evidence does not support the Board*, then that denial was an unconstitutional attempt to extort money from the Gordons (the $55,000 required to upgrade the private road to county standards) and to confiscate their real property without compensation (the perpetual use of the private road as a connector between two public streets).

Under these circumstances, the Board's own, self-serving "findings" cannot be conclusive. For where basic constitutional rights are concerned, factual findings of state administrative agencies,[42] federal administrative agencies,[43] state trial courts and juries,[44] and federal trial courts[45] are subject to *de novo* review in separate federal-court proceedings or on appeal to the federal courts.

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the *independent* determi-

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[42] *Ohio Valley Co. v. Ben Avon Borough*, 253 U.S. 287, 288-89 (1920).

[43] *Crowell v. Benson*, 285 U.S. 22, 56-64 (1932); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 50-54 (1936).

[44] *E.g.*, *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927); *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963).

[45] *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

> naton of all questions, both *of fact* and law, necessary to the performance of that supreme function. *The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact.*[46]

Thus, as here, "if the owner claims confiscation of his property will result" from the order of a local agency, the Constitution requires that he have

> a fair opportunity for submitting that issue to a judicial tribunal for determination upon *its own independent judgment* as to both law *and facts*; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.[47]

Contrary to the implication of the lower courts, the federal civil-rights statute[48] compels or countenances no different result. For, just as Congress may not constitutionally "completely oust the courts of all determinations of fact by vesting the authority to make them with finality in [federal administrative agencies]",[49] neither may it insulate local administrative agencies such as the Board from liability under the civil-rights act by licensing federal courts to treat

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[46] *Crowell*, 285 U.S. at 60 (emphasis supplied).

[47] *Ben Avon*, 253 U.S. at 289 (emphasis supplied).

[48] 42 U.S.C. § 1983.

[49] *Crowell*, 285 U.S. at 57. Congress may not "substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency * * * for the final determination of the existence of facts upon which the enforcement of the constitutional rights of the citizen depend". *Id.* at 56.

those agencies' "findings" of constitutional facts as conclusive.

> [T]o say that [administrative agencies'] findings of fact may be made conclusive where constitutional rights of * * * property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.[50]

Such a result

> would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucraic character alien to our system, whenever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality in facts becomes in effect finality in law.[51]

Importantly, here the initial trier of facts (the Board) the Gordons also identify as the constitutional malfactor; and its "factual findings" they denounce as the very means by which it wronged them. Therefore, because the Board has functioned as "the judge in its own case", the lower courts were required, not only *not* to accord conclusive authority to its self-serving "findings", but also "to examine the evidence * * * completely independently and to afford little

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[50] *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936).

[51] *Crowell*, 285 U.S. at 57.

weight to the factual determinations made by the Board".[52]

II. The Gordons stated a claim under both a "confiscation" and a "substantive-due-process" theory.

The issue of "constitutional fact" in this case is not academic—because, if found in the Gordons' favor, the central constitutional fact of whether improvement of the private road to county standards was unnecessary supports their claim on two theories: (A) a "confiscation" theory under *Nollan*[53] (that the Board's denial of the conditional-use permit was an attempt to extort property from them without compensation), and (B) a "substantive-due-process" theory under cases such as *Sinaloa*[54] (that the denial was arbitrary and maliciously purposed).

A. In *Nollan*,[55] the California Coastal Commission (the "CCC") conditioned a grant of permission to rebuild the Nollans' house on their transfer to the public of an easement across their beachfront property. The Nollans appealed to a state court, which remanded to the CCC for a full evidentiary hearing, after which the CCC made further factual findings and reaffirmed its imposition of the condition. A state court affirmed the CCC's actions.

This Court, however, held that conditioning permission to rebuild the Nollans' home on their uncom-

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[52] *Pickering v. Board of Educ.*, 391 U.S. 563, 578-79 & n.2 (1968).

[53] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[54] *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989).

[55] 483 U.S. at 827-30.

pensated grant of an easement to the public constituted an unconstitutional "taking" of their property if the condition did not reasonably relate to effectuation of the governmental purpose that justified the original restriction from which the Nollans sought an exception. "[U]nless the permit condition serves the same governmental purpose as the development ban", this Court explained, "the building restriction is not a valid regulation of land but an 'out-and-out plan of extortion.' "[56]

This Court did *not* accept the CCC's "findings" as conclusive, and did *not* defer to the CCC's supposed administrative "expertise". "We view the Fifth Amendment's Property Clause", the Court stated,

> to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. * * * [O]ur cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.[57]

Finding in the record no such " '*substantial* advanc[ing]' of a legitimate state interest", the Court ruled for the Nollans.

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[56] *Id.* at 831-37.

[57] *Id.* at 840-41.

Nollan is a template against which to gauge the Gordons' plight. Here (as in *Nollan*) the Board conditioned a land-use permit on the Gordons' acquiescence in expropriation: the forced expenditure of $55,000 to up-grade the private road to county standards; and the perpetual, uncompensated dedication of that road as a connector between two public streets. Here (as in *Nollan*) the Board concocted "findings" to rationalize its actions. But here, *in contradistinction to what this Court did in* Nollan, the lower courts slavishly deferred to the Board's "findings", avoiding inquiry into whether the actual evidence shows that denial of the permit "*substantially* advanced" Carroll County's interests in controlling development (that is, whether improvement of the private road to county standards was reasonably necessary under the circumstances).

Obviously, *Nollan* by itself entitles the Gordons to judgment if the evidence shows that the Board lacked a *substantial* factual basis for demanding the private road be improved to county standards. And, together with the cases on "constitutional fact" cited *ante*, *Nollan* just as obviously compels the lower courts to "examine the evidence in this case completely independently and * * * afford little weight to the factual determinations made by the Board".[58]

B. *Sinaloa* explained that governmental action that is "clearly arbitrary and unreasonable, having no substantial relation to the * * * general welfare", violates substantive due process, and specifically applied this doctrine to land-use planners.[59] "In determining

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[58] *Pickering*, 391 U.S. at 579 n.2.

[59] 882 F.2d at 1407-09.

whether substantive due process rights have been violated," the court held,

> we will look to such factors as the need for the governmental action in question, the relationship between the need and the action, the extent of harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm. * * * [M]alicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power.[60]

On this basis, *Sinaloa* reversed a judgment on the pleadings, saying that the

> claim goes beyond the taking of plaintiffs' property; plaintiffs also claim that government officials abused the legitimate police powers entrusted to them. While defendants dispute these charges, that dispute cannot be resolved on a motion for judgment on the pleadings.[61]

As with *Nollan*, *Sinaloa* is a well-fitting template for the Gordons' situation. Here (as in *Sinaloa*), the Gordons allege that the Board's demand to improve the private road to county standards lacks a rational relationship to a demonstrable public need, but instead serves the Board's malicious purpose of doubly expropriating the Gordons. But here, *in contradistinction to* Sinaloa, although the Board explicitly conceded *arguendo* the truth of these allegations,[62] the lower courts awarded summary judgement to the

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[60] *Id.* at 1409.

[61] *Id.* at 1410 (footnote omitted).

[62] Pet. App. at 40a.

Board anyway, with *no* independent investigation of the facts.

Obviously, *Sinaloa* (and like cases) entitle the Gordons to judgment if the evidence shows that the Board's demand to improve the private road to county standards lacked a reasonable evidentiary basis, but was instead a "cover-story" for, in effect, attempting to steal the Gordons' money and real property under color of law. And, together with the cases on "constitutional fact" cited *ante*, *Sinaloa* (and like cases) mandate independent examination of that evidence to determine what the Board's true motives were.

CONCLUSION

By accepting without examination the Board's "findings" on the "constitutional facts" of this case, and awarding the Board summary judgment on the basis of those "findings", the lower courts have created and applied an hitherto-unheard-of absolute immunity for local administrative agencies sufficiently "exercise[d] in cleverness and imagination"[63] to concoct decisions filled with "facts" that obligingly exonerate them of liability for violations of civil rights. Such an immunity "places those rights at the mercy of administrative officials", "seriously * * * impair[s] the security inherent in our judicial safeguards"[64]—and consequently (as this case illustrates) exposes private property to extortionate expropriation without either limit or remedy. Neither *Ben Avon Borough*, nor *Nollan*, nor any rational construction of the Constitution countenances this.

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[63] *Nollan*, 483 U.S. at 840.

[64] *St. Joseph Stock Yards Co.*, 298 U.S. at 52.

For these reasons, this Court should grant the Gordons' petition.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2516

IRVIN B. GORDON; PEGGY T. GORDON,
Plaintiffs-Appellants,

v.

BOARD OF ZONING APPEALS, CARROLL COUNTY, MARYLAND; JOHN TOTURA; ALBERT W. SELBY; JOHN B. FITZ,
Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, Senior District Judge. (CA-88-119-HM)

Argued: May 8, 1991

Decided: October 10, 1991

Before ERVIN, Chief Judge, HALL, Circuit Judge, and KELLAM, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Edwin Vieira, Jr., Independent Hill, Virginia, for Appellants. Charles W. Thompson, Jr., County Attorney, Westminster, Maryland, for Appellees. **ON BRIEF:** Tracy E. Mulligan, Rockville, Maryland, for Appellants. Francis A. Sauer, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

Complaining of the action of the district court in granting defendant's motion for summary judgment in their request for conditional-use zoning, Irving B. Gordon and Peggy T. Gordon (Gordons) bring this appeal. Finding no error, we affirm.

I.

Seeking a conditional-use zoning permit to establish a private croquet and bridge club, including a pro shop, dining facilities and lounge, and a catering business which would use the facilities of the club for off-premises catering, the Gordons filed their application with the Board of Zoning Appeals for Carroll County, Maryland (Board). The property which they then owned, and additional property which they were acquiring, was zoned residential and located in a residential area. After two days of hearings on the application, the Board denied the permit. The Gordons appeal of the Board's decision to the Circuit Court of Carroll County was dismissed for failure to comply with the applicable rules. They did not seek an appeal to the Court of Special Appeals as permitted by statute. Some two years after the circuit court dismissed their case, the Gordons filed this action against the Board and its individual members for declaratory and injunctive relief and compensatory and punitive damages pursuant to 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988. Attached to and a part of the complaint was a copy of the decision of the Board denying the zoning permit. The Gordons contended that the permit was denied because they would not agree to improve a private road to meet county standards and that such constituted a taking of their property. Defendants

filed a motion to dismiss or, in the alternative, for summary judgment. The matter was referred to the Magistrate Judge to conduct proceedings and submit recommendations for disposition of the motions. Finding no dispute of a material fact, the Magistrate Judge filed a report and recommendation that defendants' motion for summary judgment be granted. Following *de novo* review of the report and plaintiffs' exception thereto, the court granted the summary judgment.

The Magistrate Judge characterized and the court agreed that the Gordons were seeking to establish a claim under the Takings Clause of the Fifth Amendment.

The property in question adjoined what was known as Strawberry Estates subdivision. The Gordons were to construct two croquet courts and a building some 40 by 80 feet. The ground floor would include a 50 seat lounge, the first floor would have a dining room with some 86 seats, and food preparation areas would be on each floor. Vehicular access would be through two streets in the aforesaid subdivision and what was described as a privately owned unimproved road which had been opened and used for many years. The Gordons contemplated improving the portion of the unimproved road with tar and chips, which was inconsistent with the then existing construction of Strawbridge Terrace and the county standards for construction of county roads.

The Board found that reliance upon Placid Drive for vehicular access to and from the site, a distance of about one-half of a mile from Sykesville Road, would substantially change the residential character of vehicular traffic on Placid Drive and likely result in traffic congestion at the intersection of Sykesville Road which was controlled only by a stop sign on Placid Drive. The Board further found that since there are presently no sidewalks in the area, students attending Freedom Elementary School and Liberty High School use the road in question and the

streets which give access to the proposed project in walking to and from school; and because the proposed project would generate substantial increase in vehicular traffic to and from the site, the safety of students walking to either school would be of special concern. The Freedom Swim Club property was also nearby. The Board concluded that based on the findings regarding traffic conditions and facilities and the purpose of the zoning ordinance regulations, the conditional-use permit was denied. The Magistrate Judge's findings, confirmed and adopted by the district judge, set forth that the Board determined that in light of the residential character of the area and the proximity of neighborhood schools, the major concern was the need to provide vehicular access for substantial increase in traffic that would be generated by the construction of the project.

Appellants assert that the Board's denial of their conditional-use zoning permit was grounded in their refusal to improve the unpaved road to meet county standards and that such constituted a violation of the Takings Clause of the Fifth Amendment. The district court found that the denial did not violate the Takings Clause of the Fifth Amendment, that the condition imposed by the Board was reasonably related to the legitimate police-powers of the county and fell within the purpose of the zoning restrictions, and that the conditional-use requirement of improving the access road to meet county standards was reasonably related to reducing traffic on the existing roads in the area and the preservation of the residential character of the neighborhood. Such a holding is supported by the facts of the case.

Zoning is traditionally a governmental task requiring the "balancing [of] numerous competing considerations" and the courts should properly "refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality" (citations omitted). *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982). The Supreme

Court pointed out in *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987):

> We have longed recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

While its cases have not elaborated on the standards for determing what constitutes a "legitimate state interest", its cases have "made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements." (Citations omitted). *Id.*

To be sure "zoning 'interferes' significantly with the owners' uses of property. It is hornbook law that '[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning.' " (citation omitted). *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674, n.8 (1976).

The Court of Appeals of Maryland in *Kriger v. Planning Commission of Howard County*, 224 Md. 320, 167 A.2d 885 (1961), pointed out that the power of a municipal corporation to impose reasonable conditions upon the issuance of a permit could hardly be doubted; that if it had the authority to adopt zoning regulations, it was not arbitrary to enforce them by denying approval of a plan which did not conform. 167 A.2d at 886. The trial court found that conditions here imposed were reasonable, were reasonably related to the zoning, were within the police power and nothing in the record suggests that the commission acted in bad faith or abused its discretion. The decision of the trial court is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. HM-88-119

IRVIN B. GORDON and
PEGGY T. GORDON
v.
BOARD OF ZONING APPEALS CARROLL COUNTY, MARYLAND ET AL.

ORDER

In accordance with the foregoing Memorandum, it is this 23rd day of October, 1990, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the Report and Recommendation of Magistrate Catherine C. Blade be, and the same hereby is, *Affirmed and Adopted;*

(2) that defendants' Motion for Summary Judgment be, and the same hereby is, *Granted;*

(3) that judgment be, and the same hereby is, *Entered in favor of defendants and against the plaintiffs;*

(4) that the Clerk of the Court shall CLOSE this case; and

(5) that the Clerk of the Court shall mail a copy of this Order with the accompanying Memorandum to the parties.

/s/Herbert F. Murray
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. HM-88-119

IRVIN B. GORDON and
PEGGY T. GORDON
v.
BOARD OF ZONING APPEALS CARROLL COUNTY,
MARYLAND ET AL.

MEMORANDUM

Magistrate Catherine C. Blake issued a Report on Recommendation in the above-captioned case, recommending that defendants' motion for summary judgment be granted. Having reviewed *de novo* the Magistrate's Report, the plaintiffs' objections thereto, and the record in this case, this Court is prepared to rule.

Plaintiffs filed this action under 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988, claiming that defendants' denying plaintiffs a conditional-use permit to operate a bridge and croquet club because plaintiffs refused to improve an access road to meet county standards amounted to "extortion" and a denial of due process under the Fourteenth Amendment. Magistrate Blake correctly characterized the action as a due process claim and a claim under the takings clause of the Fifth Amendment, as incorporated against the states under the Fourteenth Amendment.

Plaintiffs' object to the Magistrate's conclusion that the takings clause was not violated since the condition imposed was reasonably related to the legitimate police-power purpose which lead the Board of Zoning Appeals ("the Board") to deny the special-use exception. This conclusion, the

plaintiffs' contend, "begs the very question raised by plaintiffs' complaint" and "gives the defendant Board's decision *conclusive* evidentiary and legal weight." (Paper No. 14, at pp. 2-3). Plaintiff goes on to assert:

> According to the inescapable logic of the Magistrate's recommendation, because the defendant Board *said* it was acting reasonably, within its legitimate police powers, and to preclude what it claimed would be "an adverse effect on the residential character of the neighborhood", *therefore* plaintiffs may not even attempt to disprove the supposed factual basis and legal propriety of the Board's decision.

Paper No. 14, at pp. 3-4.

Contrary to plaintiff's assertions, the Board's action was proper as a matter of constitutional law, not merely because the Board said its action was proper. To be valid, a zoning restriction must be within the perimeter of the police power. *Maher v. City of New Orleans,* 516 F.2d 1051, 1058 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976). The Board decided that it would not grant the special-use permit unless plaintiffs agreed to improve one of the access roads. This condition was imposed because the Board determined that increased traffic going to and from the club would have an adverse impact on the residential character of the neighborhood. A state's police power is broad, *Maher, supra,* and certainly encompasses the purpose of the zoning restriction in this case, which was to regulate traffic patterns and preserve the residential character of the neighborhood. The Supreme Court has held that separating residential areas from commercial areas and controlling traffic are purposes within the police power of a state. *See Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 391 (1926).

Furthermore, in order to be valid under the takings clause, any permit condition must be reasonably related to the police-power purpose. *Nollan v. California Coastal Com'n,* 483 U.S. 825 (1987). In the case at bar, the permit condition does not violate the takings clause because the condition imposed is reasonably related to the purpose of the restriction. Improving an access road to meet county standards is reasonably related to reducing traffic on the existing roads in the area and preserving the residential character of the neighborhood. Thus, under the standard of *Nollan, supra,* the actions of the Board in this case did not constitute a violation of the takings clause.

Upon review of the record, this Court concludes that there is no genuine issue as to any material fact in this case. Therefore, under the Fourth Circuit's standard for granting summary judgment, *see Charbonnages de France v. Smith,* 597 F.2d 406 (4th Cir. 1979), this Court will grant the defendants' motion for summary judgment.

Accordingly, this Court will enter a separate Order affirming the Magistrate's Report and Recommendation.

/s/Herbert F. Murray
Senior United States District Judge

Dated: October 23rd, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL NO. HM-88-119

IRVIN B. GORDON and
PEGGY T. GORDON
v.
BOARD OF ZONING APPEALS CARROLL COUNTY, MARYLAND ET AL.

MAGISTRATE'S REPORT AND RECOMMENDATION

On January 15, 1988, plaintiffs Irvin B. Gordon and Peggy T. Gordon filed suit in this Court under 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988 against the board of Zoning Appeals for Carroll County ("the Board") and Board members John Totura, Albert Selby and John Fitz. The Gordons claim that in denying them a conditional-use permit to operate a bridge and croquet club because they refused to improve an access road to meet county standards, the Board and the individual defendants denied the Gordons' due process of law under the Fourteenth Amendment.

The defendants filed a motion to dismiss or for summary judgment, which has been referred to me by Judge Herbert F. Murray for a report and recommendation pursuant to 28 U.S.C. § 636(b) and Local Rule 80. In addition to reviewing the defendants' motion and memorandum, the plaintiffs' opposition, the defendants' "supplement," and the plaintiffs' reply, I have requested and received from plaintiffs' counsel, Tracy E. Mulligan, a certified copy of the court file for the Gordon's prior action against the same parties in the Circuit Court for Carroll County. Relevant portions of that file are attached as exhibits to the

Report and Recommendation. No hearing is deemed necessary. See, former Local Rule 6(E).

For the reasons set forth below, I will recommend that the defendants' motion for summary judgment be granted.[1]

Facts

On August 7, 1984, the Gordons filed a conditional use request with the Board seeking permission to establish a private croquet and bridge club, including a pro shop, dining facilities, and lounge, on a 12-acre parcel of property located on Strawbridge Terrace north of Johnsville Road in Carroll County, Maryland. A hearing was conducted on September 24, 1984, and continued on October 10, 1984, before the Board.

On January 17, 1985, the Board issued a decision denying the Gordon's request. The Board determined that in light of the residential character of the area and the proximity of neighborhood schools, the major concern was the need to provide vehicular access for the substantial increase in traffic that would be generated by the club. The property was accessible by two roads, only one of which was constructed to county standards. That road passed through the local residential subdivision. The Gordons planned to improve a second road which also provided access to the property but refused, apparently because of the increased cost, to improve the road sufficiently to meet county standards. Considering the various factors set forth in the applicable zoning ordinance and the standard established in *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319, 1327, 1331 (1981), the Board found that the proposed use would have greater adverse effects at the Gordons' property than at another location, and concluded:

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[1] Since matters outside the pleadings were considered, it is proper to treat the motion as one for summary judgment as requested in the alternative by the defendants. See, Fed.R.Civ.P. 12(b).

> Based on the findings regarding the traffic conditions and facilities, decisions of the courts, and the purpose of the zoning ordinance regulations, the conditional use request is hereby denied.

(See, Complaint, Paper #1, Exhibit A at 7).

The Gordons were notified of their right to appeal the decision to the Circuit Court for Carroll County within 30 days under "Article 66B, Section 4.08 of the Code of Public General Laws of Maryland, and the Maryland Rules of Procedure." (*Id.*).

Art. 66B, Md. Ann. Code, § 4.08 provides that:

> Any person or persons. . .aggrieved by any decision of the board of appeals. . .may appeal the same to the circuit court of the county. Such appeal shall be taken according to the Maryland Rules as set forth in Chapter 1100, Subtitle B. . . .

Subtitle B of Chapter 1100 of the Md. Rules governs appeals from administrative agencies. Rule B2 requires the appellant to file an "order for appeal" with the clerk of the proper court and a "petition" within ten days thereafter. Rule B4 requires the order for appeal to be filed within 30 days from the agency decision. Rule B7 requires the administrative agency to submit the record of its proceedings, including a transcript, to the court within 30 days after receiving the petition for appeal, unless an extension is granted by the court. The appellant must pay the cost of transcription. Rule B7 specifically provides that:

> An appeal shall not be dismissed because the record has not been transmitted within the time prescribed, if it appears to the court that such delay was occasioned by the neglect, omission or inability of the agency or other party other than the appellant; provided, however, that such neglect, omission or inability shall not be presumed, but must be shown by the appellant.

On February 11, 1985, the Gordons, proceeding *pro se*, filed a "Complaint Petition" alleging, *inter alia*, that the Board's decision was "arbitrary, capricious [and] illegal" and based on fraudulent testimony, that they were denied due process by being forbidden to offer certain evidence or cross-examine witnesses, that "the Board of Zoning Appeals is attempting to use zoning powers in lieu of Eminent Domain to confiscate properties owned by private citizens," and that "the Board of Zoning Appeals is attempting to overburden a private citizen with the expense of building his private road to Carroll County Roads Department standards for public use." The defendants included Mr. Totura, Mr. Selby and Mr. Fitz "comprising the Carroll County Board of Zoning Appeals." (See Exhibit A attached hereto). An Amended Complaint Petition filed 3-26-85 added the Board's Executive Secretary, James D. Norvell, and other defendants, but repeated the same allegations. (Exhibit B).

On February 19, 1985, Mr. Norvell sent a letter to the Gordons stating the estimated cost of transcription as $517.00, directing the Gordons to forward a check directly to the reporting service, Sapperstein & Associates, and advising them that the transcription, estimated to take three weeks, would begin "with their receipt of your check." (Exhibit C). Sapperstein did not receive the Gordons' check until March 12, 1985, at which point transcription was begun. (Exhibit D). The transcript was received by the Gordons on April 16, 1985, and by the Circuit Court for Carroll County on April 26, 1985. (Exhibits E and F).

On April 22, 1985, the Board of Education of Carroll County, which had been allowed to intervene, filed a motion to dismiss the 30 day period prescribed by Maryland Rule B7(a), nor had any extension been obtained. The Gordons answered the motion by arguing that their remittance of a check to Sapperstein constituted substantial compliance with the Rule, and that the delay might be "due in

part to the recent illness of James D. Norvell." (Exhibit G). A hearing was held before Judge Luke Burns on August 9, 1985, at which Mr. Norvell apparently testified. The Board of Education relied on *Jacober v. High Hill Realty, Inc.*, 22 Md. App. 115, 321 A.2d 838 (1974); the Gordons relied on *Border v. Grooms*, 267 Md. 100, 297 A.2d 81 (1972) and *Mears v. Bruce, Inc.*, 39 Md. App. 649, 388 A.2d 550, *cert. denied* 283 Md. 730 (1978). Judge Burns, apparently finding *Jacober* persuasive under the circumstances, granted the Board of Education's motion and dismissed the Gordons' case. (Exhibits H and I).

The Gordons thereafter filed a Motion for New Trial and a motion to alter or amend the judgment. These were denied. They did not seek to appeal to the Court of Special Appeals as permitted by Art. 66B, Md. Ann. Code, Section 4.08(e). (Exhibits H and J).

On January 15, 1988, three years after the Board's original decision and more than two years after the Circuit Court dismissed their case, the Gordons, now represented by counsel, filed the present suit in this court. The complaint alleges that the Board's motivation was

> to extort from plaintiffs, for the benefit of Carroll County, Maryland, and divers [sic] persons in official positions within the county government or who deal with various branches of said government, the cost of improving the private road to county standards (approximately $55,00) and the perpetual, uncompensated use of improved road thereafter for county purposes.

(Complaint at 4-5). This is alleged to be a violation of due process under the Fourteenth Amendment and therefore a violation of 42 U.S.C. § 1983, 1985(3), and 1986.

The defendants argued in their motion that the Gordons' claim is barred by *res judicata*, and the statute of limi-

tations.[2] They argued in a supplement to the motion that abstention was appropriate and that the Gordons had not stated a claim under § 1983.

I. Statute of Limitations

The defendants argue that the Gordons' complaint should be dismissed as barred by the applicable statute of limitations. In *Wilson v. Garcia*, 471 U.S. 261, 275 (1985), the Supreme Court held that the one most appropriate statute of limitations in each state should apply to all Section 1983 actions brought in that state. In Maryland, there is a one year statute of limitations on actions for assault, battery, libel and slander, *see*, Md. Cts. & Jud. Proc. Code Ann., § 5-105 (1984 Replacement Vol.) and a general three year statute of limitations which applies to all actions not specifically provided for elsewhere in the code, *see*, Md. Cts. & Jud. Proc. Code Ann. § 5-101. The Fourth Circuit has held that the three year statute of limitations contained in § 5-101 applies to Section 1983 actions brought in Maryland. *Grattan v. Burnett*, 710 F.2d 160, 161 (4th Cir. 1983), *aff'd.*, 468 U.S. 42 (1984). Nothing in *Wilson v. Garcia* makes it likely that the decision in *Grattan v. Burnett* will or should be overturned. *See also, Hardin v. Straub*, 109 U.S. 1998 (1989) (Michigan's tolling provisions apply to extend three-year period of limitations otherwise applicable to § 1983 suits).

II. Res Judicata

The applicable principles of *res judicata* (claim preclusion) recently were stated by the Fourth Circuit as follows:

> The full faith and credit clause of article IV, as implemented by 28 U.S.C. § 1738 (1948), requires federal courts to give state court judg-

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[2] They also raised several other issues which do not need to be discussed for purposes of this Report and Recommendation.

> ments the same preclusive effect as those judgments would be accorded by a court in the rendering state. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). This principle applies to federal civil rights actions following state court actions. *Migra v. Warren City School District Bd. of Educ.*, 465 U.S. 75 [parallel citations omitted] (1984) (federal action under 42 U.S.C. § 1983). We must therefore look to the law of the State of Maryland, in whose courts [the plaintiff] first sought relief against these defendants to determine whether this action is barred. *Mears v. Town of Oxford*, 762 F.2d 368, 371 (4th Cir. 1985).
>
> Under Maryland law, as generally, there are three requirements for the application of claim preclusion. First, there must have been a final judgment on the merits in the earlier litigation. Second, there must be an identity of parties or their privies. Third, the causes of action in the successive actions must be the same. *Alvey v. Alvey*, 225 Md. 386, 171 A.2d 92, 94 (Md. 1961).

Snell v. Mayor and City Council of Havre de Grace, 837 F.2d 173, 175 (4th Cir. 1988). *See also, University of Tennessee v. Elliott*, 478 U.S. 788 (1986) (holding that federal common-law rules of preclusion require that fact finding by a state agency acting in a judicial capacity should be given the same preclusive effect by a federal court as it would be by the state court); *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984) (with respect to plaintiff's § 1983 claim, which could have been but was not litigated in prior state court case, state court judgment has the same claim-preclusive effect in federal court as it would have in the state court).

If the Maryland state courts would apply claim preclusion to bar the Gordons from litigating their present complaint in state court, and provided that the state

proceedings satisfied the "minimum procedural requirements" of the due process clause, then this court also must find their claims barred. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481, *reh'g. denied* 458 U.S. 1133 (1982); *Lee v. Winston*, 717 F.2d 888, 894 (4th Cir. 1983), *aff'd.*, 470 U.S. 753 (1985).

In this case the parties are the same or in privity, satisfying the second part of the test. Further, under the transactional approach stated in Restatement (Second) of Judgments § 24, adopted by the Maryland courts, *see Snell v. Mayor and City council, supra*, and *Kent County Board of Education v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), the present claim is sufficiently similar to the claims that were or could have been raised at the state level to satisfy the third part of the test. While the § 1983 claim could not have been raised before the Board, it could have been raised before the Circuit Court and indeed was covered in substance by the Gordons' Petition.

Under Maryland law, the Circuit Court reviews the merits of a zoning Board's decision only to determine whether there was sufficient evidence before the Board to render the issue "fairly debatable." If there was, the Court may not substitute its judgment for that of the agency. The Board's action will be affirmed unless shown to be arbitrary, capricious or illegal. *Jabine v. Priola*, 45 Md. App. 218, 412 A.2d 1277, 1285 (1980).

Under this standard, the Court may consider, however, claims that the Board violated due process under the Fourteenth Amendment, *see Schultz v. Pritts, supra*, 432 A.2d at 1323, and whether the Board's action constituted an unconstitutional taking, *see Anne Arundel County v. Maryland National Bank*, 32 Md. App. 437, 361 A.2d 134, 138 (1976). Furthermore, Maryland courts have concurrent jurisdiction over claims based on 42 U.S.C. § 1983 and the federal constitution. *See, Kutzik v. Young*, 730 F.2d 149, 152 (4th Cir. 1984) (where a professor's state court suit

against the University of Maryland for damages resulting from the University's refusal to renew his appointment was dismissed on the grounds of sovereign immunity, a subsequent federal action alleging constitutional violations under 42 U.S.C. § 1983 was barred). *See also, Ligon v. Maryland,* 448 F.Supp. 935, 946 (D.Md. 1977); *Roberts v. Gates,* 24 Md. App. 374, 330 A.2d 705, 709 (1975) (prior judgment conclusive "not only as to all matters that have been decided on the original suit, but as to all matters which with propriety could have been litigated in the first suit.") *Cf. Bethesda Ford, Inc. v. Ford Motor Co.,* 572 F.Supp. 623, 632 (D.Md. 1983) (under the circumstances, not reasonable to expect plaintiff to have raised al other issues before state authority).

The remaining question to be resolved is whether a "final judgment on the merits" was rendered in the prior Circuit Court action. A prior judgment may be final and claim preclusive within the doctrine of *res judicata* even if the court did not determine the "merits" of the case as that term is generally understood. *See, Weinberg v. Johns-Manville Sales Corp.,* 299 Md. 225, 473 A.2d 22, 31 n.12 (1984). In Maryland, a prior judgment dismissing a complaint on the grounds of sovereign immunity is sufficient to preclude further suit. *Kutzik v. Young, supra,* 730 F.2d at 151; *Annapolis Urban Renewal Authority v. Interlink, Inc.,* 43 Md. App. 286, 405 A.2d 313, 316-19 (1979). Dismissals based on lack of personal jurisdiction or improper venue, on the other hand, will not preclude a subsequent suit in the proper venue, although facts determined in connection with the dismissal will be given issue preclusive effect. *Annapolis Urban Renewal, supra,* 405 A.2d at 317.

In this case, the Gordons failed to comply with a condition precedent to obtaining state court review of the Zoning Board's decision, that is, timely transmission of the record to the Circuit Court. They were given a full and fair opportunity to prove at an evidentiary hearing before

Judge Burns that the delay was caused by others, and they failed to appeal Judge Burn's adverse ruling.

Whether the Maryland courts would grant claim preclusive effect to Judge Burns' dismissal of the Gordons' appeal is not entirely clear. Had the judge reached the merits of the action in the traditional sense, and upheld the validity of the Board's decision, further state action would be barred. *Fertitta v. Brown,* 252 Md. 594, 251 A.2d 212, 214-15 (1969); *Brandt v. Montgomery County Commission on Landlord-Tenant Affairs;* 39 Md. App. 147, 383 A.2d 688, 694-95, *cert. denied,* 282 Md. 735 (1978). Instead, Judge Burns' dismissal amounts to a determination that the Gordons had forfeited their statutorily prescribed and limited right to a direct appeal of the merits of the Board's decision. The conditions upon which such an appeal may be taken have been strictly enforced. *See, Volk v. Pugatch,* 262 Md. 80, 277 A.2d 17 (1971); *Giant Food, Inc. v. Hatcher,* 256 Md. 239, 260 A.2d 79 (1969); *Jacober v. High Hill Realty, supra. Cf., Borden v. Grooms, supra; Mears v. Bruce, supra.*

A state's policy of insisting on compliance with procedural rules in order to insure a prompt review of the evidence supporting an agency action does not necessarily imply that the state would find a dismissal on procedural grounds sufficient to preclude a claim under § 1983. *Cf., Board of County Commissioners v. Schuhly,* 72 Md. App. 702, 532 A.2d 716, 719 (1987), *cert. denied,* 311 Md. 719, 537 A.2d 273 (1988) (discussing "constitutional exception" to administrative review requirements). The plaintiff's cause of action under § 1983, while sufficiently related to fall under the 'transactional' test referred to in *Snell, supra,* is not governed by the same procedural rules or limitations established for review of agency actions. It appears more likely that the Maryland courts would find Judge Burns' dismissal in the nature of a jurisdictional or procedural ruling that would have issue preclusive, but not claim preclusive effect. *See, Annapolis Urban Renewal v.*

Interlink, Inc., supra, 405 A.2d at 318-319.[3] However, summary judgment may be recommended on other grounds, discussed below.

III. Constitutional Violation

The Gordons argue that requiring construction of the road to county standards, at an increased cost and resulting in their forced contribution of such a road to the public use, constitutes "extortion" and violates the 14th Amendment. This can best be characterized as a claim that the condition imposed by the Board on the granting of a special-use exception violates the takings clause of the Fifth Amendment, as incorporated against the states in the Fourteenth Amendment. *See, Nollan v. California Coastal Commission,* 483 U.S. 825 (1978). In *Nollan,* the California Coastal Commission conditioned a building permit for beachfront property on the owners' granting of an easement allowing the public to walk across the beach in front of the owners' house. The Supreme Court recognized that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Id.* at 836. Accordingly, "the Commission's assumed power to forbid construction

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[3] Had the Gordons filed their federal suit prior to the outcome of the Carroll County Circuit Court action, dismissal under the abstention doctrine of *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943) would have been appropriate. Zoning involves important matters of state and local policy which ordinarily should remain a state affair. The structure of decision-making and review available to the Gordons meets the *Burford* requirement of a "complex state regulatory scheme . . . for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded." *Meredith v. Talbot County, Maryland,* 828 F.2d 228, 232 (4th Cir. 1987), *quoting Browning-Ferris, Inc. v. Baltimore County, Maryland,* 774 F.2d 77, 79 (4th Cir. 1985). *See also, Caleb Stowe Associates v. County of Albermarle, Va.,* 724 F.2d 1079, 1080 (4th Cir. 1984); *Kent Island Joint Ventre v. Smith,* 452 F.Supp. 455, 462-464 (D.Md. 1978).

of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Id.* In *Nollan*, however, the Court found that allowing the public to walk across the beach did not serve the Commission's announced purpose of protecting the view of the beach for passersby on the other side of the shorefront property. The Court stated: "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.* at 837. *See also, Naegele Outdoor Advertising, Inc. v. Durham*, 844 F.2d 172, 178 (4th Cir. 1988); *Wintercreek Apartments of St. Peters v. St. Peters*, 682 F.Supp. 989, 995 (E.D.Mo. 1988); *Faux-Burhans v. County Commissioners of Frederick County*, 674 F.Supp. 1172, 1175 (D.Md. 1987), *aff'd without op.*, 859 F.2d 149 (1988), *cert. denied*, 109 S.Ct. 869 (1989).

In this case, an examination of the Board's decision shows that the condition imposed was reasonably related to the legitimate police-power purpose which caused the Board to deny the special-use exception. After hearing testimony at two days of hearings, the Board concluded that the increased traffic would have an adverse effect on the residential character of the neighborhood, particularly if only one of the possible access roads met county standards. The requirement of a "nexus" between the condition and the original purpose of the zoning restriction to which the Gordons sought an exception is satisfied. No unconstitutional taking occurred.[4]

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[4] The defendants do not directly discuss the question whether the Gordons' taking claim is premature under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), which requires both a final decision by the local zoning authority and an attempt to secure compensation for the alleged "taking" through any

To the extent that the Gordons' complaint may be construed as a due process claim, it lacks merit on this ground also.[5] Procedural due process requires notice and a meaningful hearing; substantive due process requires that the government's action not be clearly arbitrary or without a substantial relation to the public welfare. *Sinaloa Lake Owners Association v. Simi Valley,* 864 F.2d 1475, 1481, 1484 (9th Cir. 1989); *Citizen's Association of Portland v. International Raceways,* 833 F.2d 760, 761-62 (9th Cir. 1987). Those requirements have been satisfied.

IV. Conclusion

Accordingly, for the reasons discussed above, it is hereby recommended that the defendants' motion for summary judgment be GRANTED.

July 10, 1989
Date

/s/Catherine C. Blake
Catherine C. Blake
United States Magistrate

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available state procedures. If such a remedy is available, it must be sought before the federal claim will be ripe. *See, Four Seasons Apartment v. Mayfield Heights,* 775 F.2d 150, 151 (6th Cir. 1985); *Northern Virginia Law School, Inc. v. Alexandria,* 680 F.Supp. 222, 224-225 (E.D.Va. 1988). The burden would be on the plaintiffs to establish that Maryland law does not provide an available adequate inverse condemnation remedy. *Wintercreek Apartments v. City of St. Peters, supra,* 682 F.Supp. at 993; *Mitchell v. Mills County,* 673 F.Supp. 332, 336 (S.D.Iowa 1987), *aff'd.,* 847 F.2d 486 (8th Cir. 1988).

A recent Fourth Circuit case indicates that a takings claim should not proceed to trial unless it is clearly mature. *Nacgele Outdoor Advertising Inc. v. City of Durham, supra,* 844 F.2d at 175.

[5] The Gordons have stated that they did not intend to present a procedural due process claim. See, Plaintiffs' Reply at 4.

OFFICIAL DECISION
BOARD OF ZONING APPEALS
CARROLL COUNTY, MARYLAND

APPLICANTS:	Irvin B. Gordon & Peggy T. Gordon 5714 Strawbridge Terrace Eldersburg, Maryland 21784
REQUEST:	A conditional use request for the establishment of a private croquet and bridge club, including a pro shop, dining facilities and lounge, as a recreational use
LOCATION:	On property located on both sides of Strawbridge Terrace north of Johnsville Road at 5714 Strawbridge Terrace north of Johnsville Road at 5714 Strawbridge Terrace in Election District 5. Part of the property is identified as Strawbridge Terrace subdivision, Section 4, Lot 11 B as recorded in the Carroll County Plat Records in Plat Book 8, page 48. Additional acreage not part of the subdivision comprises the remainder of the property.
BASIS:	Article 7, Section 7.2(e); Zoning Ordinance 1E.
HEARING HELD:	September 27, 1984; CONTINUED: October 10, 1984

FINDINGS

The Board's consideration of this case is governed by the provisions of Article 17, Section 17.6 of Zoning Ordinance 1E. Accordingly, attention will first be directed to the subject property, and then to the neighborhood.

As shown by Applicants' Exhibit 6, the proposed site of the croquet and bridge club is located on the west side of Strawbridge Terrace, about 850 feet north of Johnsville Road intersection. That portion of the property is identified as Strawbridge Estates subdivision, Section 4, lot 11B, which contains 4.5998 acres. Strawbridge Terrace, through the frontage of lot 11B and lot 11A as created from original lot 11, is constructed to county standards in accordance with the provisions of the Carroll County Subdivision Regulations. The remainder of the road, between the southerly side property line of lot 11A and Johnsville Road to the south, is not constructed to county standards. It may best be described as a privately owned road that has been open for, and used by, the public for many years. As the acreage in addition to lot 11B is part of a preliminary subdivision plan known as Stone Manor, subdivision of the parcel from the property is subject to the requirements of the Carroll County Subdivision Regulations and the approval of the Carroll County Planning and Zoning Commission. In the Planning and Zoning Commission's conditional approval letter dated October 3, 1978, of a preliminary subdivision plan for Stone Manor, item 20 reads:

> "That Hodges Road, Johnsville Road and Strawbridge Terrace be improved to county standards (including sidewalks); said work to be included in a Public Works Agreement filed with any final plat submitted for Commission approval."

The remaining acreage is located on the easterly side of Strawbridge Terrace, and on the west side of the road, 270 feet south of lot 11B, and extending to Johnsville Road.

Applicants' Exhibit 3A shows the location of the 40 feet by 80 feet building, a parking area in front of the building, an existing dusk to dawn light, and one croquet court to the west of the building and parking area. The croquet

court appears to be located 20 feet from the rear property line, which is the front property line of lot 11A. A second croquet court is shown on the east side of Strawbridge Terrace with another proposed parking area having vehicular access to Strawbridge Terrace as well as to that portion of the road not improved to county standards. The remaining acreage of the site is planned to be used to grow sod. Applicants' Exhibit 2 consists of elevation drawings of the building and floor plans for the ground floor, including a lounge having 50 seats. Applicants' Exhibit 3C shows the floor plan for the first floor, with a total of 86 seats. Food preparation areas are proposed on the ground floor and first floor. A service bar is proposed initially on the ground floor, with a future service bar on the first floor. The applicants also plan to operate an off-premises catering service from the building, using the food preparation facilities.

Strawbridge Estates subdivision adjoins the subject property to the north. There are 100 lots shown on Applicants' Exhibit 6, counting two parcels and lots 7 and 11 which have been subdivided into two lots each. Additional sections of the subdivision are located farther north but are separated from the lots shown on Applicants' Exhibit 6 by topographic barriers. Lot 8 of Section 4 is immediately north of the subject building and is surrounded on three sides by lot 11 B. Lot 8 is improved with a dwelling. Lot 7A Section 4 is located opposite lot 8 on Strawbridge Terrace and is also improved with a dwelling. A right-of-way, apparently in fee simple and seldom used, extends easterly from Strawbridge Terrace along the southerly side property line of lot 7A and beyond to the Freedom Swim Club property. This strip of land also forms the northerly boundary of the subject acreage on the east side of the road. The easterly boundary adjoins 6.384 acres owned by the Freedom Swim Club, and Johnsville Road establishes the southerly boundary. Vehicular access to the Swim Club is from Johnsville Road. That part of the acreage located

on the west side of the road not improved to county standards appears to average 160 feet in width as shown paralleling the center line of Johnsville Road, and 470 feet northward to property indicated as being that of John T. Antlitz. Vehicular access to lot 11B by roads constructed to county standards is provided by Placid Drive and Strawbridge Terrace, which were constructed in conjunction with the development of Strawbridge Estates subdivision. Vehicular access is also possible by using the public road, which is not constructed to county standards nor maintained by the county, that extends between Johnsville Road and Strawbridge Terrace. Twin stone entrances and identification sign structures are planned, one on each side of the road, 100 feet from Johnsville Road. Students attending Freedom Elementary School who reside in this part of Strawbridge Estates subdivision use Placid Drive to walk to and from school, which fronts on Sykesville Road (Md. Rt. 32) several hundred feet north of Placid Drive intersection. Students attending Liberty High School use Strawbridge Terrace and the public road to walk to and from school which is located on land on the south side of Johnsville Road opposite the public road intersection.

As noted on Applicants' Exhibit 3A, that portion of the road is concrete and 12 feet in width. The applicants propose to establish a two-lane, tar and chip road, 20 feet in width at an estimated cost of $25,00. The proposed road will not comply with county standards. The applicants indicated that the county estimated the cost to construct the road to county standards would be $80,000, and that they had no intentions to do so. Applicants' Exhibit 7, a copy of the Comprehensive "Mini" Plan for the Freedom Area and Environs includes a copy of the officially adopted plan showing both Placid Drive and Strawbridge Terrace to be classified as existing major streets. Subdivision of property involving a major street is also subject to the Carroll County Subdivision Regulations and the approval of the Planning and Zoning Commission.

Attention will now be directed to the remaining factors of Section 17.6 that must be considered:

> "(a) The number of people residing or working in the immediate area concerned."

The immediate area consists of a large section of Strawbridge Estates subdivision, Freedom Elementary School, Liberty High School, and acreage to the south and west that may be developed residentially. The Freedom Swim Club is located to the east. Some land may continue to be used for agricultural purposes, including sod as proposed by the applicants, until public sanitary sewerage is available.

> "(b) The orderly growth of a community."

The use of the subject property would generate a substantial increase in vehicular traffic to and from the site, but other affects would probably have little impact on development in the area, assuming that Strawbridge Terrace would be completed to county standards.

> "(c) Traffic conditions and facilities."

The applicants' proposal to improve the concrete road by constructing a two-lane tar and chip road, 20 feet wide is inconsistent with the existing construction of Strawbridge Terrace, and the standards for construction of county roads. Reliance solely upon Placid Drive for vehicular access to and from the site distance of about half a mile from Sykesville Road (Md. Rt. 32), would substantially change the residential character of vehicular traffic on Placid Drive and likely result in traffic congestion at the intersection of Sykesville Road (Md. Rt. 32), which is controlled only by a STOP sign on Placid Drive.

> "(d) The effect of such use upon the peaceful enjoyment of people in their homes."

Adjacent residents would be expected to notice outside activities, at least to some extent. during the croquet play-

ing season. Residents that are located farther from the site would be less affected.

"(e) The conservation of property values."

Although a number of opponents presented testimony citing depreciation of property values, no testimony or evidence was presented by an expert in real estate. The applicants indicated that the proposed use should improve property values.

"(f) The effect of odors, dust, gas, smoke, fumes, vibrations, glare and noise upon the use of surrounding property values."

Ordinarily, the operation of the croquet and bridge club would not result in any of the above conditions.

"(g) The most appropriate use of land and structure."

In considering the size and design of the building, and the testimony both pro and con, this factor is debatable. However, unless Strawbridge Terrace is completed to county Standards, it is evident that the most appropriate use of the building would be of residential character.

"(h) Decisions of the courts."

For the purpose of brevity, only *Schultz v. Pritts*, 291 Md. 1 (1981) will be cited. On pages 22 and 23 of that opinion the Court established the present standard for determination of special exceptions, which are termed conditional uses in Zoning Ordinance 1E. The opinion reads:

"We now hold that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespec-

tive of its location within the zone." (Citations omitted)

It is obvious in this case that providing for vehicular access to and from the subject property, and the substantial increase in vehicular traffic that may reasonably be expected to be generated by the 50 seat lounge, 86 seat club-dining room, and 2 croquet courts are the major problems. Even with the dismissal of all other factors presented in opposition to the request, it is evident that with vehicular access by only one road, built to county standards, located entirely within a residential subdivision, the proposed use would have *greater adverse effects* at this particular location than the use might have elsewhere.

"(i) The purpose of these regulations as set forth herein."

The conditional use request as presented by the applicants is not in keeping with the purpose of the zoning ordinance as it is their specific intent not to complete the construction of Strawbridge Terrace to county standards, thereby providing for reasonable and safe vehicular access to and from the subject property without the necessity of all vehicular traffic using Placid Drive and passing through Strawbridge Estates subdivision.

"(j) Type and kind of structures in the vicinity where public gatherings may be held, such as schools, churches, and the like."

It is unlikely that the operation of, or events held at Freedom Elementary School or Liberty High School would be adversely affected. However, as there are presently no sidewalks along Placid Drive, and Strawbridge Terrace, or proposed by the applicants, the safety of students walking to either school would be of special concern.

CONCLUSION

Based on the findings regarding the traffic conditions and facilities, decisions of the courts, and the purpose of the zoning ordinance regulations, the conditional use request is hereby denied.

Jan. 17, 1985 — /s/John Totura

Date

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND

Civil No. HM 88-119

IRVIN B. Gordon and
PEGGY T. GORDON,

Plaintiffs,

v.

BOARD OF ZONING APPEALS, CARROLL COUNTY, MARYLAND,
and
JOHN TOTURA, ALBERT W. SELBY, and JOHN B. FITZ, in their official and individual capacities,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, COMPENSATORY AND PUNITIVE DAMAGES, AND ATTORNEYS' FEES

INTRODUCTION

This is a civil-rights action, brought pursuant to Title 42, United States Code, Sections 1983, 1985(3), 1986, and 1988, for declaratory and injunctive relief, compensatory and punitive damages, and attorneys' fees.

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this action under Title 28, United States Code, Section 1343.

2. Venue is proper in this Court under Title 28, United States Code, Section 1391(b).

II. PARTIES TO THIS ACTION

3. Plaintiffs Irvin B. Gordon and Peggy T. Gordon are husband and wife, citizens of the United States and of the State of Maryland, who reside at 5714 Strawbridge Terrace, Eldersburg, Carroll County, Maryland 21784.

4. Defendant Board of Zoning Appeals, Carroll County, Maryland, ("Board") is an administrative agency of Carroll County, Maryland, with offices located in the County Office Building, Westminster, Maryland 21157.

5. Defendant John Tortura was a member of the Board at all times material to this action. He resides at 1323 Bachman Valley Road, Westminster, Maryland 21157. He is sued in his individual and former official capacities.

6. Defendant Albert W. Selby was a member of the Board at all times material to this action. He resides at 623 Old Liberty Road, Sykesville, Maryland 21784. He is sued in his individual and former official capacities.

7. Defendant John B. Fitz was a member of the Board at all times material to this action. He resides at 1967 Deerpark Road, Finksburg, Maryland 21048. He is sued in his individual and former official capacities.

III. OPERATIVE FACTS

8. Plaintiffs sought from the Board a conditional-use zoning permit for the establishment of a private club, including dining facilities, food-preparation facilities, and a lounge on property they own at 5714 Strawbridge Terrace, Eldersburg, Maryland. Plaintiffs intended to include in this development other adjoining land which they had a contract to purchase.

9. Vehicular access to the plaintiffs' proposed club was to be provided by two routes: (a) Placid Drive and Straw-

bridge Terrace, which are streets constructed to county standards and maintained by the County; and (b) a private road, not constructed to county standards or maintained by the county, which exists on the lot plaintiffs had a contract to purchase. At hearings before the Board on 27 September and 10 October 1984, plaintiffs testified that they intended to establish a two-lane, tar-and-chip road, twenty feet in width along the then-existing private road. The cost of this improvement was estimated at $25,000, as opposed to an estimated cost of $80,000 to construct the road to county standards. Unchallenged expert-testimony introduced at the hearings confirmed that the improvement plaintiffs proposed would be adequate for the vehicular traffic anticipated at the club, even if all the traffic used the private road.

10. Plaintiffs did not offer to improve the private road to county standards for two basic reasons: (a) excessive cost, in light of the proposed use; and (b) improvement to county standards would allow the private road to function as a connector between the then-existing county roads Strawbridge Terrace and Johnsville Road, in effect causing plaintiffs to subsidize the provision of a county road and dedicate private property to public use without compensation.

11. In its decision of 17 January 1985, the Board, *per* the individual defendants, denied plaintiffs' request for a conditional-use permit. *See* EXHIBIT A attached hereto and incorporated herein by reference. The controlling factor in the Board's denial of the permit was plaintiffs' refusal to improve the private road to county standards, as evidenced by the following statements *inter alia:*

> "* * * unless [the private road] is completed to county standards, it is evident that the most appropriate use of the [subject property] would be of residential character [and not for a private club]" (Exhibit A, p. 5)

> "Even with the dismissal of all other factors presented in opposition to the request, it is evident that with vehicular access by only one road, built to county standards, * * * the proposed use would have *greater adverse effects* at this particular location than the use might have elsewhere." (Exhibit A, p. 6)
>
> "The conditional use request as presented by the applicants is not in keeping with the purpose of the zoning ordinance as it is their specific intent not to complete the construction of [the private road] to county standards * * *." (Exhibit A, p. 6)

12. The motivation of the individual— and, through them, of the Board — in so denying plaintiffs' request for a conditional-use permit was to extort from plaintiffs, for the benefit of Carroll County, Maryland, and divers persons in official positions within the county government or who deal with various branches of said government, the cost of improving the private road to county standards (approximately $55,000) and the perpetual, uncompensated use of the improved private road thereafter for county purposes.

13. Plaintiffs appealed the Board's decision to the Circuit Court for Carroll County, Maryland. But their appeal was dismissed for procedural reasons.

IV. CLAIM FOR RELIEF

14. The denial of plaintiffs' request for a conditional-use permit constituted an attempt by the Board and the individual defendants to condition the grant of a Maryland statutory privilege on plaintiffs' agreement to dedicate private property to public use without compensation, and to subsidize (also without compensation) the construction of a county road.

15. If Maryland law does not allow so conditioning the grant of a conditional-use permit, then the individual defendants have denied plaintiffs Due Process of Law under Section 1 of the Fourteenth Amendment to the United States Constitution, and thereby violated 42 U.S.C. §§ 1983, 1985(3), and 1986.

16. If Maryland law does allow so conditioning the grant of a conditional-use permit, then that law is unconstitutional under the Due Process Clause of Section 1 of the Fourteenth Amendment, and the Board has violated 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

A. Adjudge and declare that the decision of the Board of 15 January 1985 (Exhibit A hereto) is illegal, void, and of no effect, in so far as it purports to deny plaintiffs a conditional-use permit for the subject property on the grounds stated therein.

B. Adjudge and declare that the Board and the individual defendants have violated 42 U.S.C. §§ 1983, 1985(3), and 1986 by denying plaintiffs a conditional-use permit under color of the Board's decision of 15 January 1985.

C. Adjudge and declare that the violations of 42 U.S.C. §§ 1983, 1985(3), and 1986 by the individual defendants were intentional, malicious, and done without any *bona fide* belief in the stated legal or factual bases for denying plaintiffs a conditional-use permit.

D. Enter a preliminary and permanent injunction restraining the Board from refusing to grant plaintiffs a conditional-use permit on the ground of plaintiffs' refusal to improve the private road to county standards, or any other engineering standard not reasonably required for the use plaintiffs intend to make of said road were the permit granted.

E. Enter a mandatory injunction requiring the Board to issue to plaintiffs the conditional-use permit they requested.

F. Grant plaintiffs compensatory damages, jointly and severally against defendants, for all income lost because of the illegal denial to plaintiffs of the conditional-use permit, from and after 15 January 1985.

G. Grant plaintiffs punitive damages of $100,000, jointly and severally against defendants, for defendants' intentional, malicious, and bad-faith denial of plaintiffs' request for a conditional-use permit and consequential abridgment of plaintiffs federal constitutional and statutory rights.

H. Grant plaintiffs their reasonable attorneys' fees, jointly and severally against defendants, pursuant to 28 U.S.C. § 1988.

I. Grant plaintiffs all other costs of this action.

And,

J. Grant plaintiffs such other and further relief as the Court finds may be necessary and proper in the premises.

Respectfully submitted,

TRACY E. MULLIGAN, ESQ.
EDWIN VIEIRA, JR., ESQ
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Attorneys for Plaintiffs

REQUEST FOR JURY TRIAL

Plaintiffs hereby request a jury trial on all issues comprehended within this action which may be triable by jury.

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM-88-119

IRVIN B. GORDON and PEGGY T. GORDON
Plaintiffs

v.

BOARD OF ZONING APPEALS OF CARROLL COUNTY, MARYLAND
and
JOHN TOTURA, ALBERT W. SELBY
and
JOHN B. FITZ, in their official and individual capacities
Defendants

Filed

Mar 4 1988

At Baltimore
Clerk U.S. District Court
District of Maryland

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

The Carroll County Board of Zoning, John Totura, Albert W. Selby and John B. Fritz, individually and in their official capacities, Defendants, by Francis A. Sauer and Charles W. Thompson, Jr., County Attorney for Carroll County, Maryland, their attorneys, move pursuant to Rule 12b of the Federal Rules of Civil Procedure to Dismiss the within Complaint, or, in the alternative, move, pur-

suant to Rule 56, for summary judgment in their favor as a matter of law and, state as follows:

1. That the within Complaint fails to state a cause of action upon which the relief prayed can be granted.

2. That this Court does not have jurisdiction over the claims asserted in the Complaint.

3. That the Complaint fails to state a cause of action upon which the relief prayed can be granted against these Defendants.

4. That Defendant, Carroll County Board of Zoning Appeals is not a legal entity and, therefore, is not a real party in interest.

5. That Defendant, John Totura is, and during all times mentioned in the Complaint, was duly appointed, qualified and acting as a member of the Carroll County Board of Zoning Appeals, and in doing the things alleged by Plaintiff, Defendant acted in the discharge of this quasi-judicial duties and within his jurisdiction.

6. That the Defendants Albert W. Selby and John B. Fitz were, during all times mentioned in the Complaint, duly appointed, qualified and acting as members of the Carroll County Board of Zoning Appeals, and in doing the things alleged by Plaintiffs, Defendants acted in the discharge of their quasi-judicial duties and within their jurisdiction.

7. That the Plaintiffs are collaterally estopped from bringing this action by virtue of a Judgment entered against them by the Circuit Court of Carroll County.

8. That the Plaintiffs' right to maintain this action is barred by the one year statute of limitations, Maryland Annotated Code, Courts and Judicial Proceedings Article, Section 5-106. More than one year has now elapsed between the date Plaintiffs' alleged cause of action arose, and the date Plaintiffs filed their Complaint.

9. That the within Complaint fails to state a cause of action under 42 U.S.C. Sections 1983, 1985 (3) 1986, 1988 or any other appropriate body of Federal Law.

10. That the within Complaint fails to state an actionable deprivation of any constitutional rights of the Plaintiffs caused or occasioned by these Defendants.

11. That the individual Defendants are immune with respect to the claims presented in the within Complaint.

12. That this Court has no jurisdiction over the pendant state law claims, which fail to state causes of action against these Defendants, as a matter of law.

13. That the Plaintiffs failed to give the proper notice as require by the applicable State Law of its intention to bring a claim in the above-entitled matter.

14. That there is no dispute as to any material facts with which the claims presented in the Complaint are concerned, and therefore, these Defendants are entitled to summary judgment in their favor as a matter of law.

For the reasons stated, the Defendants respectfully request that this Honorable Court dismiss the within Complaint, or, in the alternative, that this Court enter summary judgment in their favor as a matter of law, assessing costs and expenses against the Plaintiffs and reasonable attorneys fees pursuant to 42 U.S.C. 1988 as appropriate.

/s/ Francis A. Sauer
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Supreme Court of the United States

No. A-452

Irvin Gordon and Peggy Gordon,
Petitioners

v.

Board of Zoning Appeals, Carroll County, Maryland, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 7th, 1992.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 2nd
day of ~~December, 1991~~
January, 1992.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *